

W/O

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA (Plaintiff) vs. STEVEN CARROLL DEMOCKER (Defendant)	Case No. CR 2008-1339 UNDER ADVISEMENT RULING re: Motion for New Finding of Probable Cause	FILED JAN 22 2009 DATE: 10 O'Clock A M. JEANNE HICKS, CLERK BY: SHEETAL PATEL Deputy
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HONORABLE Thomas B. Lindberg

BY: Martha Wolfinger / Judicial Assistant
Division Six

DIVISION SIX

DATE: January 22nd, 2009

Re: DEFENDANT'S December 12, 2008 MOTION FOR NEW FINDING OF PROBABLE CAUSE

On December 12, 2008, Defendant filed a motion for a new finding of probable cause in the above-captioned case, alleging that the Defendant was denied a substantial procedural right. On January 6, 2009, the State filed a response to the Defendant's Motion. On January 8, 2009, the Defendant filed a reply. Oral argument took place on January 16, 2009. The matter is thus submitted to the Court and ripe for decision.

The Yavapai County Grand Jury by a 9-3 vote returned an indictment in this case October 31, 2008. The transcript of proceedings was filed on November 4, 2008. The first official appearance of the Defendant, including entry of not guilty plea, was held in this case on November 10, 2008.

Rule 12.9, Arizona Rules of Criminal Procedure provides:

"a. Grounds. The grand jury proceedings may be challenged only by motion for a new finding of probable cause alleging that the defendant was denied a substantial procedural right, or that an insufficient number of qualified grand jurors concurred in the finding of the indictment."

The grand jury has been described as "a primary security to the innocent . . . it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason" *Wood v. Georgia*, 370 U.S. 375, 390 (1962). Its role is to determine whether there is probable cause to believe a crime has been committed and whether the person under investigation committed it. The grand jury's mission is to bring to trial those who

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may be guilty and clear the innocent. *Marston's, Inc. v. Strand*, 114 Ariz. 260, 264, 560 P.2d 778, 782 (1977). Because defendants enjoy few procedural rights before the grand jury, grand juries must be unbiased and independent and must act "independently of either prosecutor or judge". *Id.*

"[W]hen a duly constituted grand jury returns an indictment valid on its face, no independent inquiry may be made to determine the kind of evidence considered by the grand jury in making its decision." *State ex rel Preimsberg v. Rosenblatt*, 112 Ariz. 461, 462, 543 P.2d 773, 774 (1975). Indeed, the Supreme Court has affirmed, in one of the more recent leading cases, *Crimmins v. Superior Court*, 137 Ariz. 39, 668 P.2d 882 (1983), that an indictment cannot be attacked based on the nature, weight or sufficiency of the evidence. But grand jury proceedings may be challenged for denial of substantial procedural rights. Rule 12.9. The accused is entitled to due process during grand jury proceedings, requiring use of unbiased grand jury and fair and impartial presentation of evidence. *Crimmins v. Superior Court*, *supra*.

A suspect is not generally present at grand jury presentations. The State must engage in a fair presentation of facts. "A prosecutor acts not simply as an advocate but as a 'minister of justice,' who assists the jurors in their inquiry." *Maretick v. Jarrett*, 204 Ariz. 194, 197, 62 P.3d 120, 123 (2003). The prosecutor has an obligation to correct false or misleading testimony. See *Nelson v. Royston*, 137 Ariz. 272, 669 P.2d 1349 (App. 1983).

Both sides in this case properly acknowledge that the prosecutor also has a duty to present clearly exculpatory evidence to the grand jury. *Trebus v. Davis*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997). Clearly exculpatory evidence is evidence "of such a weight that it might deter the grand jury from finding the existence of probable cause." *Id.*

The Defendant has raised a number of issues. The State responds that, though some misstatements were made or inconsistencies existed in testimony, none of the issues resulted in prejudice to the Defendant or deprived him of a fair and impartial presentation to the grand jury. In a criminal proceeding, an error is harmless if it can be said that, beyond a reasonable doubt, the error had no effect on the jury's judgment. See *Maretick v. Jarrett*, *supra*, 204 Ariz. at 198, 62 P.3d at 124; *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

The Court concludes, based on a reading of the grand jury transcript, that the Defendant was deprived of a substantial procedural right in the lack of a fair and impartial presentation to the grand jury through a combination of factors.

The Court finds that the following items were clearly exculpatory evidence under the *Trebus* decision and were not fairly presented to the grand jury:

From July 3, 2008, the police had DNA samples and fingerprints from the Defendant. There was omitted or misleading testimony concerning DNA analysis of the evidence taken from the

cordless phone found next to the victim and which she was presumably on when her mother's call was interrupted. The lead grand jury witness, when asked if there was DNA evidence found, testified that he did not know; the second witness testified that the major (component) was Carol's, the minor was inconclusive, but Knapp had been excluded. The testimony was misleading in that the jury was not told there was a component from an unknown male. This was known to law enforcement through lab reports issued prior to the grand jury presentation.

Similarly, the grand jury witnesses for the State failed to tell the grand jury that unknown male DNA was found in samples taken from two of the unscrewed light bulbs from the laundry room. This was known to law enforcement through lab reports issued prior to the grand jury presentation. The testimony presented only indicated that the testing had been "inconclusive".

Regarding swabbing of blood evidence on a door handle, the grand jury was told that the major component was Carol's, the minor has been called "inconclusive", but Steven was excluded. While not as misleading as the other testimony, it was incomplete; the grand jury was not advised that results of testing showed an unknown male as providing the minor component. This was known to law enforcement through lab reports issued prior to the grand jury presentation.

Other testimony was also misleading: The grand jury received apparently correct testimony that the victim's fingernails were scraped during the autopsy procedure and that the DNA testing of the left hand scrapings showed DNA from an unknown male. However, the detective then immediately tried to explain the results by saying that the medical examiner's office did not "sterilize" the clippers between each use. However, it was not disputed that police reports indicated that Ms. Gere of the medical examiner's office told detectives on August 4, 2008 that they "would usually clean them after being used."

The Court finds the above to constitute sufficient justification for remand of the matter to the grand jury. But it is also the context of the entire proceedings that emphasizes the need to return the matter to the grand jury for a redetermination of probable cause.

The testimony was wrong in the detective's belief that Defendant was read his *Miranda* rights when interviewed the night of Carol Kennedy's death.

The testimony was wrong concerning the arrest date.

The testimony was wrong concerning the payment of spousal maintenance, when it began, whether payment had been made, and was wrong in the assumptions about the relative financial condition of the Defendant before and after the divorce decree was entered compared to his financial obligations imposed under the temporary orders.

Furthermore, in a number of instances the witnesses for the State offered opinion, usually unsolicited, concerning the case rather than testimony regarding the facts. This colored the presentation. For example, the detective offered his belief that Mr. Democker was in the laundry room after having gotten in the house when Carol was out for a run. (Tr. p.54:21) He offered his opinion that it was odd for the Defendant to inquire about the condition of the body. (Tr. p.53:21). He offered his surmise that the severity of the injuries to the victim suggests rage by the perpetrator and that rage suggests a relationship between attacker and victim (Tr. P.15-20). In addition, there were references by the detective as fact to the Defendant hiding assets in his divorce (Tr. p.67:9); that he made false statements regarding going to the office to turn off a computer (Tr. p.55:13); that there was evidence of "tax cheating" (Tr. p.66:15-24); that the Defendant used escort services (Tr. p.58:20), an item of questionable probative value compared with the prejudicial effect.

And a grand juror offered factual statements concerning the possible consequences of an accusation of fraud on the career of a financial advisor. (Tr. p.67:21).

Other misleading or prejudicial testimony adds context to the Court's consideration of the presentation and the Court's finding that the presentation did not meet requisite standards, but by itself none would require remand. The detective characterized the trail on which the Defendant claimed to be riding as "basically across the street from his wife's neighborhood" (Tr. P. 52:3-4), when it was approximately 1-1.5 mile away. The detective stated that Democker asked if the interview during the early morning hours of July 3 could be "quick" when Defendant never actually used that word, but rather asked if the interview was going to be all night and explained that he was tired and claimed that he was scheduled to be covering the office alone the next day; that he would prefer not to be up all night.

The Court declines to rule whether "consistent" means the same as "similar", but the better practice would be for the witness to employ the same language as the prospective expert witness. That did not occur in various parts of the grand jury testimony. Whether it was the intention of the witness to make the case appear better by using other language and omitting the qualifying language the Court will not speculate.

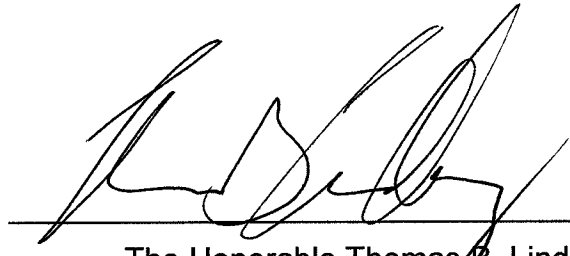
The State acknowledged that misstatements were made in testimony, but argued that none of the issues resulted in prejudice to the Defendant or deprived him of a fair and impartial presentation to the grand jury. In a criminal proceeding, an error is harmless if it can be said that, beyond a reasonable doubt, the error had no effect on the jury's judgment. Based on its consideration of the matter, the Court is unable to conclude that there was no effect on the jury's judgment beyond a reasonable doubt.

For the foregoing reasons, **IT IS ORDERED** that the Defendant's Motion for New Finding of Probable Cause is **GRANTED**.

The Defendant requested that the case be remanded with instructions, directing the particular manner of presentation concerning the various issues raised in the motion. But no legal authority has been provided the Court in statute, rule or case law to support the proposition that the Court may give instructions in an order remanding a case to the grand jury. Nor is the Court aware of such authority. Thus, out of proper respect for the grand jury and the co-equal executive branch of government represented by the prosecution, the Court declines to do so.

Because the Defendant is in custody, the Defendant also requested that the Court set a time limit by when a presentation of the case must be made. The State did not oppose the request. Thus, **IT IS ORDERED** that a presentation must be made to the grand jury within twenty (20) days of the date this order is issued.

DATED this 22nd day of January, 2009.


The Honorable Thomas B. Lindberg
Yavapai Superior Court / Division Six

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